Supreme Court, U.S.
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No. 051669 MAY 15 2006

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IN THE

Supreme Court of The United States

GEORGE KOURKOUNAKIS,

Petitioner

v.

JOSEPH DELLO RUSSO, MD

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether FRE 201 applies to extrajudicial research on the Internet. Answer in the courts below: implicitly no.

2. Whether a district court can *sua sponte* make its own *Daubert* motion based on its extrajudicial Internet research, notwithstanding opposing counsel having never brought this issue before the court. Answer in the courts below: implicitly yes.

3. Whether *Daubert* was meant to allow a district court to grant summary judgment as a matter of discretion instead of using the stringent standards of Fed. R. Civ. P. 56 by *sua sponte* striking a medical doctor's expert testimony and then granting summary judgment because there is no expert support in opposition. Answer in the courts below: implicitly yes.

Preface

This is a medical malpractice case brought under diversity jurisdiction where it is alleged that Dr. Joseph Dello Russo, MD injured George Kourkounakis during a routine LASIK procedure and caused him significant loss of sight in both eyes.

The Second Circuit in a Summary Order affirmed the trial court's granting of summary judgment to Dr. Dello Russo. Issues of material fact predominated the litigation, and this case appeared to be one that would be decided before a jury on the basis of opposing expert testimony in accordance with each party's expert report submitted under FRCP Rule 26 (a)(2)(B).

The trial court for the first time on oral argument, however, informed the parties that it had "googled" Dr. Tizes, MD (plaintiff's expert), to obtain evidence *dehors* the record. The court made it clear that from the "googling," it was privy to certain information concerning Dr. Tizes. The trial court nonetheless used this information to discredit the good doctor's opinion to the point of not considering it in opposition to the Summary Judgment motion. In other words, the trial court conducted its own behind the scenes *Daubert* investigation and improperly granted summary judgment to defendant Dr. Dello Russo, MD by informally striking plaintiff's expert report and ruling on defendant's summary judgment motion as if were unopposed by expert testimony. The Second Circuit Court of Appeals (Hon. Dennis Jacobs, Hon. Pierre N. Leval, Hon. Chester J. Straub) affirmed in a Summary Order.

This Court should grant certiorari because the Second Circuit Court of Appeals, by its decision, has sanctioned a far departure from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power within the meaning of Supreme Court Rule 10(a).

Parties to Proceeding

George Kourkounakis—Petitioner

Joseph Dello Russo, MD—Respondent

There are no corporate entities who are parties.

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Citation to Lower Court Cases

Kourkounakis v. Dello Russo, 2005 U.S. Dist. LEXIS 8020 (SDNY 2003)

Kourkounakis v. Dello Russo, 2006 U.S. App. LEXIS 3786 (2d Cir. February 14, 2006)

These lower court decisions are reproduced in full in the appendix to this Petition for Certiorari.

Statement of Jurisdiction

This Court has subject matter jurisdiction under 28 USC §1332. The parties are diverse and the amount in controversy exceeds $75,000.

This Court has appellate jurisdiction under 28 USC §1254(1). The United States Court of Appeals for the Second Circuit, on February 14, 2006, "ordered, adjudged and decreed that the judgment and order of the district court be affirmed."

This Petition for Certiorari was served and filed on or before May 15, 2006 (90 days after February 14, 2006), and is timely within the meaning of Supreme Court Rule 13.

Federal Rules at Issue

FRE 201: Judicial Notice of Adjudicative Facts

Fed. R. Civ. Pro. 56: Summary Judgment

Statement of the Case and Facts

Prior to February of 2002, Plaintiff-Appellant GEORGE KOURKOUNAKIS, complained of poor night vision and difficulty seeing distance clearly at night. KOURKOUNAKIS, however, could see at hand distance prior to his LASIK surgery. KOURKOUNAKIS heard an advertisement on 1010 WINS radio for LASIK surgery by DR. JOSEPH DELLO RUSSO, MD. Plaintiff's first appointment with DELLO RUSSO was on February 12, 2002. Plaintiff-Appellant was not expecting to have the procedure done on February 12, 2002, but rather at a later date. William T. Kellogg, MD is a physician in the employ of Dr. DELLO RUSSO who had his license to practice medicine revoked by the State of New Jersey, and never had a license to practice medicine in the State of New York. Dr. Kellogg's New Jersey medical license was revoked for performing laser surgery on patients with healthy eyes to their detriment. This fact was unbeknownst to KOURKOUNAKIS when Dr. Kellogg, masquerading as a licensed physician, obtained the "informed consent," and guaranteed to KOURKOUNAKIS that he would be able to read at hand's distance after the surgery. Subsequent to the LASIK procedure, KOURKOUNAKIS in fact returned to DELLO RUSSO's office and was again seen by Dr. Kellogg who was still, unbeknownst to KOURKOUNAKIS, masquerading as a physician when Kellogg wrote in KOURKOUNAKIS's chart with the complaint that KOURKOUNAKIS could not read or see things up close after the surgery.

Plaintiff-Appellant GEORGE KOURKOUNAKIS had a very poor outcome from his LASIK surgery where his near-vision is so poor that he cannot do everyday tasks such as seeing items on store shelves and reading, activities that he could do before he underwent the LASIK procedure. This abrupt decrease in KOURKOUNAKIS's near vision was

directly and proximately caused by the LASIK procedure performed by JOSEPH DELLO RUSSO, MD.

The Local Rule 56.1(b) Statement (SDNY) is contained as an appendix to this Petition and shows the disputed material facts in this litigation.

Argument

The district court erred by disregarding the expert report of Dr. Bruce R. Tizes, MD, which if accepted as true (in the light most favorable to the non-moving party), would raise disputed issues of material fact, and thus preclude summary judgment. For example, Dr. Tizes opined that the LASIK procedure performed by JOSEPH DELLO RUSSO, MD was the direct and proximate cause of KOURKOUNAKIS's reduction in near vision, and his sharp near vision reduction was not the result of presbyopic aging. Dr. Tizes's expert opinion is diametrically opposed to the defense expert's opinion (who by the way did not submit an expert report fully meeting the requirements of FRCP Rule 26).

Not only did the district court fail to consider the factual opinions in Plaintiff's expert's report, but for the first time at oral argument, the court informed the parties that it had "googled" Dr. Tizes to obtain evidence *dehors* the record. The court's discussion of the "googling" occupied a significant part of the transcript on oral argument. The court made it clear that it was privy to information concerning Dr. Tizes, and used this information to discredit the good doctor's opinion to the point of not considering it in opposition to the Summary Judgment motion. *See* Appendix. The court's conduct in this respect violated FRE Rule 201, and was not harmless error since it clearly influenced its decision to grant summary judgment to the Petitioner.

Finally the lower court's Memorandum Order is internally inconsistent with the criteria for granting summary judgment. The Memorandum and Order repeatedly states that "plaintiff

must show..." certain requirements for a doctor to be found liable for failure to obtain a patient's informed consent. But the criteria or requirements that the court cites are evidentiary criteria for trial, and cannot properly be considered on Defendant DELLO RUSSO's motion for summary judgment. Instead, the court must construe all evidence in the light most favorable to the non-moving party, in this case Plaintiff KOURKOUNAKIS. Likewise, the District Court erred by criticizing non-movant Plaintiff's Local Civil Rule 56.1(b) statement for failing to "assert exactly what his injuries were" and "nowhere specifying how much deterioration there was from before the surgery to afterwards...," when such contentions were not stated in the movant's 56.1(a) statement, and Plaintiff fully complied with his obligations under Local Rule 56.1(b).

The trial court erred by *sua sponte* "googling" plaintiff's expert witness and taking judicial notice of his findings in violation of FRE 201, and using those findings in his decision without giving plaintiff an opportunity to be heard

It is undisputed that the court performed an extensive Internet search of Plaintiff's expert Dr. Tizes, and the first time Plaintiff's counsel learned of this Internet search was on March 17, 2005 during oral argument on the summary judgment motion. Plaintiff did not seek an opportunity to be heard under FRE 201(e) on the propriety of the court taking such judicial notice and the tenor of the matter noticed because the court stated that: "I am not going to consider the following [all information obtained in an Internet search of Dr. Tizes] in making any decision...." To Plaintiff's counsel's surprise, not only did the trial court consider the inaccurate one-sided information that it took judicial notice of concerning Dr. Tizes, but the court incorporated said information in its Memorandum Order to discredit the good doctor and decide the motion to the severe prejudice of the Plaintiff.

FRE 201(b) states that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1)

generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources to accuracy cannot reasonably be questioned. *e.g.* Savage Universal Corp v. Grazier Construction, Inc., 2004 U.S. Dist. LEXIS 16088 n. 5 (SDNY 2004) (judicial notice of the fact that readily available internet mapping services place Grazier's admitted residence approximately 25 miles from his post office box, and approximately 22 miles from the city of Eugene); Holly v. Boudreau, 2004 U.S. Dist. LEXIS 4815 (N. Dist. Ill. 2004) (judicial notice of the Illinois Department of Corrections' Internet-accessible database, which shows Holly serving sentences for second-degree murder and concealing a homicidal death); Graham v. Smith, 292 F. Supp. 2d 153 n.2 (Dist. of Maine 2003) (judicial notice of pleading obtained from PACER system).

In contrast, courts will not permit judicial notice of facts that do not meet the criteria of FRE 201(b). *e.g.* Scanlan v. Tex. A&M Univ., 343 F.3d 533 (5th Cir. 2003) ("It would have been improper for the district court to have taken judicial notice of the Final Report of the Special Commission on the 1999 Texas A&M Bonfire, even though posted on the Internet. That action would have been improper because "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b). The Final Report cannot be characterized as generally known within the Southern District of Texas or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.")

The information the court obtained by "googling" Dr. Tizes, "because Tizes's St. Thomas address did catch my eye," does not fit into either of the categories for taking judicial notice under FRE 201. *See* Appendix.

This issue of district courts using the Internet to perform their own discovery was a case of first impression for the Second Circuit. Instead of seizing the opportunity to determine the law of the Circuit, the Circuit court by affirming the District Court in a Summary Order compounded the judicial error and countenanced extrajudicial research on the Internet.

The American Bar Association has already addressed this issue and proposes to amend the ABA Model Code of Judicial Conduct to include a comment prohibiting judges from conducting independent investigation through "electronic access" (i.e., over the Internet). Model Code of Jud. Conduct R. 2.09(b) (Proposed Official Draft May 2004). The commentary to that rule provides as follows: "The prohibition against a judge investigating the facts of a case independently or through a member of the judge's staff extends to information available in all mediums including electronic access." The ABA proposal is offered as an extension of the long-accepted ethical canon that "a judge shall not independently investigate facts in a case." ABA Model Code of Jud. Conduct, Canon 3.B.7 commentary. Model Code of Jud. Conduct R.2.09(b).

The New York Appellate Division Second Department is one of the few courts to have addressed the issue, and it has taken a dim view of judges performing their own Internet research.

In NYC Med. & Neurodiagnostic, P.C. v. Republic W. Ins. Co, 8 Misc. 3d 33, 38 (2d Dept. 2004) the court reversed the trial court and held that:

> This error was further exacerbated by the court's conduct in initiating its own investigation into the facts when, based upon the insufficient submissions of plaintiff, the court should have dismissed the complaint. In conducting its own independent factual research, the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties

> an opportunity to respond to its factual findings. In effect, it usurped the role of counsel and went beyond its judicial mandate of impartiality. Even assuming the court was taking judicial notice of the facts, there was no showing that the Web sites consulted were of undisputed reliability, and the parties had no opportunity to be heard as to the propriety of taking judicial notice in the particular instance (*see* Prince, Richardson on Evidence § 2-202 [Farrell 11th ed]).

There is a significant risk of misinformation. The Internet retains its popularity, in part, because the opportunity to publish and add to its content is largely unrestricted. Yet this open invitation to publish also operates to discredit the authoritativeness and accuracy of Internet materials. "[A]nyone with an Internet service provider and a quarter to call it can set up a Web page that looks as official as a 1040 form, without the quality control that used to come from editors, fact checkers, and large publishing houses. There are few barriers to bad information online." (Tina Kelley, "Whales in the Minnesota River," *N.Y. Times*, March 4, 1999, at G1); *see also* Janet Reno v. Amer. Civil Liberties Union, 521 U.S. 844, 853 (1997). ("Any person or organization with a computer connected to the Internet can 'publish' information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals").

At least one federal court, whose decision has been liberally cited, has already declared a profound distrust of Internet materials, calling the Internet "one large catalyst for rumor, innuendo and misinformation." St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp. 2d 773 (SD Tex. 1999). The court stated:

> Plaintiff's electronic "evidence" is totally insufficient to withstand Defendant's Motion to Dismiss. While some look to the Internet as

> an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. So as to not mince words, the Court reiterates that this so-called Web provides no way of verifying the authenticity of the alleged contentions that Plaintiff wishes to rely upon in his Response to Defendant's Motion. There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. [**4] [*775] Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on any web-site from any location at any time. HN4 For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in FED. R. CIV. P. 807.

Given the potential for misinformation in Internet research, the New York Bar State Association Committee on Professional Ethics issued attorneys the following caution: *"To the extent that the attorney in performing legal research for clients relies on information obtained from searching of Internet sites, the attorney's duty under Canon 6 to represent the client competently requires that the attorney take care to assure that the information obtained is reliable."* NYSBA Comm. on Prof'l Ethics, Op. 709 (Aug. 16, 1998). No similar caution, however, has apparently been issued to judges,

probably because it was heretofore assumed that judges would not consider evidence not before the court.

Furthermore, by tacitly making its own *Daubert* finding with no briefing, hearing or other opportunity for plaintiff to challenge the court's evidentiary conclusion, plaintiff was denied any chance whatsoever of submitting opposition. It seems to be an improper use of this Court's holding in *Daubert* and its progeny to outright reject expert testimony whose weight should be considered by a jury and thereby effectively allowing summary judgment to be granted as a matter of discretion.

The Court should grant certiorari on the ground that the district court admittedly engaged in its own discovery via the Internet, and further used that information to discredit the written report of plaintiff's expert and to formulate its opinion on summary judgment. By doing so, the district court granted summary judgment to Dr. Dello Russo to the severe prejudice of George Kourkounakis when issues of material fact not only remained, but predominated the litigation. The Court needs to exercise its supervisory power within the meaning of Supreme Court Rule 10(a) so that federal judges continue to strictly follow evidentiary rules, and their decisions do not fall prey to the "rumor, innuendo and misinformation" pervasive on the Internet that is accessible with the click of a mouse.

Respectfully submitted,

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APPENDIX : SJ ARGUMENT (RELEVANT PORTIONS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

George Kourkounakis
Plaintiff,

v.

04 Civil 586 (JSR)

Joseph Dello Russo
Defendant.

March 17, 2005
12:00 noon

Before:
Hon. Jed S. Rakoff, USDJ
Appearances:
VICTOR SERBY, ESQ.,
Attorney for plaintiff
255 Hewlett Neck Road
Woodmere, New York
MARULLI ASSOCIATES, P.C.
Attorneys for defendant
115 Broadway
New York, New York
FRANCESCA M. ERICHSER, ESQ.,
Of counsel

THE COURT: So with respect to your expert report, your expert, who is both a doctor and a lawyer and apparently largely as an investment advisor in the Virgin Islands, what credential does he have that would allow the court under Rule 702 of the Federal Rules of Evidence to admit his report for purposes of this motion on the issue of expertise in the adequate explaining of the risks of Lasik surgery?

MR. SERBY: He is board's eligible in ophthalmic surgery and he also has done an ophthalmology residency.

THE COURT: An ophthalmology residency I don't think would render him an expert. When was the last time, do we know, when he performed --sorry --the last time when he explained to any patient or observed anyone else explaining to any patient the risks of Lasik surgery?

MR. SERBY: He did a residency in the department of ophthalmology in 1987 and --

THE COURT: At which time Lasik surgery was either non-existent or in its infancy, right?

MR. SERBY: That's correct. But nonetheless, he continued his license in various places, and for this case he is reactivating his Illinois license, I do believe, and he has --

THE COURT: Well, you may want to think twice about that. Your adversary didn't bring a Daubert motion. If she had, I have the most serious reservations as to whether or not you would have been able to survive that motion. I am not going to consider the following in making any decision, but I note for what it is worth that since Dr. Tizes's St. Thomas address did catch my eye, my clerk did a quick Internet search and discovered that Dr. primary occupation for some years now has been as the managing partner of an investment strategy firm operating out of the Virgin Islands called Sailrock, S-A-I-L-R-0-C-K.

MR. SERBY: I'm sorry, your Honor, but I do believe there was also Gault Capital.

THE COURT: Also Gault Capital, it has been both. Gault Capital he is also the managing partner of. According to Gault Capital's Web site listing, Gault Capital is a boutique St. Thomas U.S. Virgin Island based investment advisor founded by Bruce Tizes and Ed Sicota. We specialize in behavioral finance and opportunistic trend following. Not Sailrock, the affiliated outfit, says, their Web site, that they are a Virgin Islands strategic investment manager, specialize in real property development located in the most beautiful places on earth." So Dr. Tizes, who is also a lawyer as well, is obviously a man of many talents. The question is, does he have any talent relevant to the issue of advising --relevant to giving an opinion on the adequacy of the advice given to the plaintiff. Did the defense take his deposition?

MS. ERICHSER: No, your Honor.

THE COURT: Why not? Because you had no doubts about the admissibility of his --

MS. ERICHSER: No. We seriously doubt the adequacy of his report and we --

THE COURT: You didn't move to strike it?

MS. ERICHSER: No, your Honor, we haven't.

THE COURT: You take his deposition? I tell --he says that in formulating his opinions, he read the deposition of the plaintiff, he read the plaintiff's chart, he relies on certain unstated statements made by the plaintiff. That, of course, I must say, the notion that plaintiff's counsel moved to strike your report, which he, in effect, did, your defendant's experts report on inadequacy in mind boggling given many of the inadequacies

of the plaintiff's own expert report. It doesn't suffice under the Federal Rules to simply say you rely on "statements made by George Kourkounakis" without specifying what they are or anything about them. He also says he looked at numerous other things, including the depositions, as I mentioned, and nothing he looked at would appear to relate to the advice given to the plaintiff, except the consent form, which we will talk about in a minute, and Mr. Kourkounakis' deposition. So I think the opinion to the extent it has any admissibility rests on what was said by the plaintiff. So turn to that. What is it, Mr. Serby, that the plaintiff said that the warnings were inadequate?

MR. SERBY: In the plaintiff's deposition, question, do you remember --

THE COURT: What page are you?

MR. SERBY: Paragraph 10 of the Rule 56.1(b) response.

THE COURT: Your response?

MR. SERBY: Correct.

THE COURT: Hang on a minute. I actually should see the deposition. Did you annex the deposition?

MR. SERBY: I typed it out verbatim.

THE COURT: So you didn't bother to give me the actually deposition so I have no way to figure it out from the context --

MS. ERICHSER: There are some portions --

THE COURT: --of your submission. Hang on, we will do this one step at a time. Let me find first Mr. Serby's 56.1(b) statement. (Pause) Okay, I got it. What paragraph?

MR. SERBY: It is paragraph 10, your Honor.

THE COURT: Okay. The assertion by the defendant was prior to undergoing the procedure, the plaintiff was told that surgery would improve his vision and increase his ability to read. In response, the response is plaintiff admits that he was told that Dr. Russo was told that the surgery would improve his vision. Plaintiff denies that he was only told that surgery would increase his ability to read. Defense counsel purposefully, pretty strong accusation, Mr. Serby, to make of a fellow member of the bar --

MR. SERBY: I apologize for that, your Honor, but it did, indeed, omit what came after the quoted --

THE COURT: That may be --

MR. SERBY: I apologize for the characterization.

THE COURT: Defense counsel purposely omits the balance of that conversation as well. Q. Do you remember anything specific that he told you before you met Dr. Russo? A. He mentioned to me that the surgery will improve my vision and it will decrease the ability to read, but within hand distance I will be able to read. I said, you know, in that case it's okay for me if I can read hand distance, any point hand distance like that, he says, he will be able to read normally. With that in mind I says, okay, let's go for it. Q. Was your concern at that time it might change your ability to read up close? A. In the way he described it to me it was within hand distance. I said, you

know, within hand distance, I could live with that if it improves my night vision and other vision. If I can read hand distance I'm happy. Q. Did he say that the surgery might affect your ability to read hand distance? A. No. He said you will be able to read within hand distance. That's what he said to me, that's why I went for it, because I wanted to improve seeing far and hand distance I could live with it, yeah. Q. Up to that point, did you have any problems reading hand distance? THE WITNESS: No, I Had this person discussed with you specifically what was involved in the Lasik procedure? A. No. If he did, I don't remember. Q. Did he discuss with you any possible complications that may occur from the Lasik? A. No. He said to the deposition transcript from pages 54 to 56.

MR. SERBY: That is correct, your Honor.

APPENDIX: PLAINTIFF'S EXPERT REPORT

BRUCE R. TIZES, M.D.
P.O. BOX 7549
ST. THOMAS, VI 00801

December 9, 2004

Victor M. Serby, Esq.
255 Hewlett Neck Road
Woodmere, NY 11598

Re: Kourkounakis v. Dello Russo, M.D.
04 CV 00586 (JSR)

Dear Mr. Serby:

In response to your request for my review of the medical records of George Kourkounakis concerning his LASIK procedure performed by Joseph Dello Russo, MD together with other relevant material concerning this litigation, and my opinion as to the cause of his present poor vision, I submit the following:

This report expresses my expert opinions that to a reasonable degree of medical certainty:

(1) George Kourkounakis' near-vision is substantially decreased after he underwent the LASIK procedure performed by Joseph Dello Russo, MD.

(2) The LASIK procedure performed by Joseph Dello Russo, MD was the direct cause of the decrease in near-vision of George Kourkounakis.

(3) George Kourkounakis' rapid decrease in vision was not the result of "normal" presbyopic aging, but instead part of the constellation of .

(4) A decrease in near-vision is one of the risks of the LASIK procedure performed on George Kourkounakis.

(5) Joseph Dello Russo, MD deviated from accepted medical practice and standards by his failure to adequately and meaningfully explain the risks of the LASIK procedure he was to perform on George Kourkounakis.

(6) To a reasonable degree of medical certainty, the "informed consent" that George Kourkounakis signed was meaningless in view of the way it was obtained.

(7) It was a gross deviation from good and accepted practice for Joseph Dello Russo, MD to use the services of William T. Kellogg, MD to explain the benefits and risks of LASIK to George Kourkounakis as a basis for informed consent. Joseph Dello Russo knew that William T. Kellogg was unlicensed to practice medicine in the State of New York. Joseph Dello Russo knew that William T. Kellogg's license had been revoked in the State of New Jersey for, among other things, fraudulently performing laser treatment of patients' eyes solely for his own "pecuniary enrichment," on multiple occasions, even after he was brought to task before the New Jersey State Board of Medical Examiners.

(8) It was a gross deviation from good and accepted medical practice and a deviation from the legal standard of medical care for William T. Kellogg, MD, an unlicensed physician employed by Joseph Dello Russo, MD, that Dello Russo himself admits is merely employed as a

"technician", to masquerade as a licensed physician and represent to George Kourkounakis [on behalf of Joseph Dello Russo, MD] that he [Kourkounakis] will be able to read within hand distance after the LASIK surgery.

(9) It was a deviation from good and accepted medical standards concerning informed consent, to perform LASIK, a purely elective (and non-emergency) surgery, on George Kourkounakis, without giving George Kourkounakis adequate time to contemplate whether or not this surgery was right for him.

(10) It was a deviation from good medical practice in the local community, for Joseph Dello Russo, MD to fail to give George Kourkounakis a copy of the appropriate "Patient Information Booklet" contained in the manual for the LadarVision 4000® excimer laser system. This booklet should have been given to all prospective patients including George Kourkounakis before the procedure, on a day other than the day that the procedure, so that any informed consent is valid.

(11) George Koukounakis' vision after he underwent the LASIK procedure cannot be adequately compensated by the use of corrective lenses.

My opinions and any subsequent testimony concerning the same are based on sufficient facts and data, and my opinions are the product of reliable medical principles, standards and methods, and I have applied the medical principles and methods reliably to the facts of this case.

Data

Data considered by me in formulating my opinions were:

1) The Chart of George Kourkounakis as produced by Joseph Dello Russo, MD.

2) The Charts of George Kourkounakis from his visits to other ophthalmologists subsequent to Dr. Dello Russo including Bruce Zagelbaum, MD.

3) Statements made by George Kourkounakis.

4) The Alcon LadarVision 4000 System Operation Manual Version 5.11 with Physician's Booklet—Professional Use Information Manual—Myopia and Astigmatism, and CustomCornea LASIK physician's booklet—Myopia, and Patient Information Booklet—Myopia and Astigmatism, and CustomCornea LASIK Patient Information Booklet—Myopia, and Physician's Booklet—

5) All pleadings and discovery responses in this case.

6) Joseph Dello Russo, MD's answers to form interrogatories certified by him on 7/13/03 in a lawsuit brought against him in the State of New Jersey, McLoughlin v. Dello Russo.

7) The file maintained by the New Jersey State Board of Medical Examiners concerning, William T. Kellogg, MD, including, but not limited to the suspension/revocation orders concerning his license.

8) Deposition testimony of Plaintiff George Kourkounakis and exhibits thereto.

9) Deposition testimony of Joseph Dello Russo, MD and exhibits thereto.

10) An article wherein the reporter quoted Joseph Dello Russo, MD as stating that he has "zero complications" from his LASIK procedures.

11) "Dello Russo Laser Vision" advertisement re: no-blade customcornea.

12) Plaintiff's Exhibit 7 re: Dello Russo e-mails on International Society of Refractive Surgery Bulletin Board.

13) Office of the Professions, New York State Education Department, and American Board of Medical Specialties listings for Joseph Dello Russo, Joyce Katzman, and Jeremy Blair Meltzer, MD and noting the absence of a New York State license or registration for William T. Kellogg, MD, and the lack of any Board Certification for Jeremy Blair Meltzer, MD.

14) New York State Public Health Law § 2805-d (concerning informed consent).

15) New York State Education Law §6530 (defining professional misconduct).

All the above data and facts are of the type reasonably relied upon by physicians in forming opinions and inferences as to Kourkounakis' present condition with respect to his eyes, and formulating opinions with respect to sufficient informed consent for a LASIK procedure.

Basis of My Opinions

1) George Kourkounakis has a very poor outcome from his LASIK surgery where his near-vision is so poor that he cannot do everyday tasks such as seeing items on store shelves and reading, that he could do before he underwent the LASIK procedure. This poor outcome, standing alone, may not be malpractice. What is malpractice, however, is the fact that Mr. Kourkounakis was not meaningfully informed of the risks of the LASIK procedure that he was about to undergo so that he could properly consent to that procedure with full knowledge of its risks and benefits. As an absolute minimum, Mr. Kourkounakis

should have been given a copy of the appropriate Patient Information Booklet written by the manufacturer of the LadarVison 4000 Excimer Laser System on a day other than the day he was to undergo the procedure. Mr. Kourkounakis should have been given the opportunity to discuss his prospective surgery with a licensed medical doctor, board certified in ophthalmology. Instead, William T. Kellogg, MD, an unlicensed physician in New York, and who had his license revoked in New Jersey for fraudulent practice involving unnecessary laser procedures, many of which permanently damaged his patient's eyes, explained George Kourkounakis' procedure to him in an inadequate manner, from both a content and temporal basis.

2) It was also a deviation from the standard of care, for Joseph Dello Russo, MD to trust the post-operative care of George Kourkounakis to William T. Kellogg, MD when it was apparent that Mr. Kourkounakis was suffering from some complications of the LASIK procedure.

3) Presbyopia is caused by an age-related process which generally proceeds gradually over time. This is different from astigmatism, nearsightedness and farsightedness, which are related to the shape of the eyeball and cornea and caused by genetic factors, disease, or trauma. Presbyopia is generally believed to stem from a gradual loss of flexibility in the natural lens inside the eye. These age-related changes occur within the proteins in the lens, making the lens harder and less elastic with the years. Age-related changes also take place in the muscle fibers surrounding the lens. With less elasticity, the eye has a harder time focusing up close. This is not what happened to George Kourkounakis. His near-vision decreased rapidly after the LASIK surgery, and the only

proximate causative factor to account for this vision decrease was the LASIK surgery itself. Accordingly, it can be said to a reasonable degree of medical certainty that the LASIK procedure performed by Joseph Dello Russo, MD caused the abrupt decline in Mr. Kourkounakis' near vision. Although Mr. Korkounakis, due to his age, undoubtedly had some degree of presbyopia at the time of his LASIK procedure, Dr. Dello Russo's deposition testimony that said presbyopia was the cause of the abrupt worsening in Mr. Kourkounkis' vision from the time just before the LASIK procedure to the time just after the LASIK procedure has no legitimate medical basis.

4) New York State Education Law §6530 (11), (25), (25-a), (33), (34) and (37) lists several types of medical misconduct that Dr. Joseph Dello Russo, MD committed concerning the treatment of George Kourkounakis. Contrary to the statements of Dr. Dello Russo, that Dr. Kellogg was acting as a "mere technician," Dr. Kellogg was in fact an unlicensed individual performing activities requiring a license, and Dr. Dello Russo, was permitting, aiding and abetting this unlicensed practice. Dr. Dello Russo improperly delegated professional responsibilities to Dr. Kellogg when he knew that Dr. Kellogg was not qualified by licensure to perform them. Dr. Dello Russo failed to disclose the identities of all physicians involved in Mr. Kourkounakis' treatment. Dr. Dello Russo failed to exercise appropriate supervision over persons (particularly Dr. Kellogg) that are authorized to practice only under the supervision of Dr. Dello Russo, MD. Dr. Kellogg, inappropriately guaranteed that Kourkounakis would be satisfied by the results of his LASIK surgery, and that he will be able to read within hand distance after the LASIK surgery.

5) New York State Public Health Law § 2805-d (concerning informed consent) lays the basis of my opinion that George Kourkounakis was not given adequate informed consent, especially for an elective procedure with possible severe undesirable consequences. Informed consent is lacking when an elective procedure, such as LASIK is performed within hours of an alleged "informed consent," and the information that forms the basis of the alleged "informed consent," is given by an unlicensed physician whose license was revoked for fraudulent practice where he performed unnecessary procedures solely for his pecuniary gain. Even if Dr. Dello Russo provided proper information to Mr. Kourkounakis concerning the LASIK procedure, the fact that this information was provided to Mr. Kourkounakis the same day of the procedure, without time for contemplation or reflection on the part of Mr. Kourkounakis is improper.

My qualifications including a list of publications are listed in my CV as an appendix to this report.

I have not testified as an expert at trial within the preceding 4 years.

My fee for preparing this report is $850.00

My fee for testifying in this case is $2,500.00 for a half day's testimony and $4,500.00 for a full day's testimony.

Sincerely yours,

/S/

Bruce R. Tizes, MD

BRUCE RANDOLPH TIZES, M.D., J.D.

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DEMOGRAPHIC INFORMATION:

Children:	Two
Citizenship:	United States of America
Residence:	St. Thomas, US Virgin Islands
Date of Birth:	5 November 1960
Languages:	English, Spanish
Place of Birth:	New York, New York, USA
Sex:	Male

EDUCATION:

Secondary:	George W. Hewlett High School Hewlett, New York New York State Regents Diploma, 1976
Undergraduate:	University of the State of New York Albany, New York Bachelor of Science, 1982
Graduate:	Oakland University Center for Health Sciences Rochester, Michigan Certification, 1982
	University of Health Sciences The Chicago Medical School North Chicago, Illinois

Doctor of Medicine, 1984

Northwestern University
School of Law
Chicago, Illinois
Juris Doctor, 1999

Post-Graduate: [Residency]

The Chicago Medical School
Department of Internal Medicine
North Chicago, Illinois
Two Year Residency Certificate, 1985

State University of New York, Health Science Center at Brooklyn
Kings County Hospital and Affiliated Hospitals
Department of Ophthalmology
Brooklyn, New York
Two Year Residency Certificate, 1987
Microsurgical Course, 1986 - 1987
Ophthalmic Laser Course, 1987
Chief Administrative Resident, 1987 – 1988

University of Texas at Houston
Hermann Eye Institute
Basic Science Course, Ophthalmology
Houston, Texas
Certification, 1987

MEDICAL LICENSURE:

American Samoa	1279-T
Colorado	30162
Illinois	036079873
New Mexico	83-126

New York 160717-1
West Virginia 16198

ORGANIZATIONAL MEMBERSHIP (ABRIDGED):
Association of Emergency Physicians
Chicago Medical School Alumni Association
World Future Society

MEDICAL, MICROCOMPUTER AND PUBLISHING EMPLOYMENT (ABRIDGED):
Consultant, Microcomputer Systems, 1980 - 1983
District Supervisor, Lynbrook Diagnostic Laboratories, 1981-1983
Newspaper Columnist, Bay Ridge Spirit, 1987
Editor-in-chief, bioMEDICUS, Connect Information Network, 1987 - 1989
Editor-in-chief, medLAW, Connect Information Network, 1987 - 1989
Contributing Medical Editor, Lane Medical Litigation Guide, 1987
Director, MacGuideMagazine, Inc., 1988 - 1989
President, Keva Systems, Inc., 1989 - 1990
Private Practice, Ophthalmology, 1990 - 1992

PROFESSIONAL CERTIFICATIONS:

Federal Licensure Examination (FLEX)
Federation of State Medical Boards, 1982

Advanced Cardiac Life Support, Provider
American Heart Society, 1990

Advanced Trauma Life Support, Provider
American College of Surgeons, 1990

EMERGENCY MEDICINE AND TRAUMA SPECIFIC EMPLOYMENT:

Resident Physician, The Chicago Medical School, Dept. of Internal Medicine, 1983 - 1985
Resident Physician, State University of New York, Dept. of Ophthalmology, 1985 -1988
Attending Physician, Grant Hospital, 1989 - 1990
Attending Physician, Hahnemann Air Force Base, 1989 - 1990
Attending Physician, Cannon Air Force Base, 1990
Attending Physician, Ohio Valley Medical Center, 1990
Attending Physician, L.B.J. Tropical Medical Center, 1990
Attending Physician, Mount Sinai Hospital, 1990 - 1992
Attending Physician, Jackson Park Hospital, 1990 - 1996
Attending Physician, Humana Hospital, 1991 - 1993
Attending Physician, Ingalls Memorial Hospital, 1992 - 1993
Attending Physician, Little Company of Mary Hospital, 1992 - 1995
Attending Physician, Medical Emergency Care Associates, 1994 - 1995
Attending Physician, Chicago Osteopathic Medical Center, 1993 - 1995

SIGNIFICANT HONORS AND OTHER APPOINTMENTS:

President, Student Body, Center for Health Sciences, 1982
Oakland University

Member, Student Governing Council, 1982 - 1984
Member, Membership Committee, 1983 - 1984, 1991 - 1992
Chicago Medical Society

Delegate, Cook County House of Representatives, 1983 - 1984
Illinois State Medical Society

Member, Board of Governors, 1991 - present
The Chicago Medical School Alumni Association

Member, Admissions Committee, 1984 - 1985
The Chicago Medical School

Certified Apple Partner (Developer), 1988 - 1990
Apple Computer, Inc.

Chairman, Department of Ophthalmology, 1990
L.B.J. Tropical Medical Center
Government of American Samoa / U.S. Department of the Interior

Medical Director, Recovery Bridge, 1990 - 1991
Chicago College of Osteopathic Medicine

Chief, Division of Ophthalmology, 1990 - 1992
Mount Sinai Hospital and Medical Center

Associate Director, Department of Emergency Medicine, 1993 - 1995
Chicago Osteopathic Medical Center
Chicago College of Osteopathic Medicine

Founding Member, Board of Directors, 1993 - 1995
Association of Er rgency Physicians

Managing Partner, 2000 - present
Galt Capital

MEDICAL AND MICROCOMPUTER FACULTY APPOINTMENTS:

Instructor, Department of Ophthalmology

State University of New York, 1987 - 1988

Lecturer, MacWorld Exposition
Mitch Hall Associates, 1988 -1989

Lecturer, Macintosh Business Exposition
Cambridge Marketing, 1989

Adjunct Assistant Professor, Department of Internal Medicine
Chicago College of Osteopathic Medicine, 1990 - 1992

Assistant Professor, Department of Emergency Medicine
Chicago College of Osteopathic Medicine, 1993 - 1995

PAPER AND ELECTRONIC PUBLICATIONS:

1. Tizes, R., Tizes, B.R. "Lipo-Hibernoma: Report of an Unusual Case," Angiology 25:228,1974
2. Tizes, R., Tizes B.R. "The Rights of Mentally Incompetent and Senile patients to Emergency Hospital Care," The Journal of Legal Medicine 5:8AA, 1977
3. Tizes, B.R. "Intraocular Lens Implantation," Lane Medical Litigation Guide, 1982
4. Tizes, B.R. "Cataract," Lane Medical Litigation Guide, 1982
5. Tizes, B.R. "Family Medicine: The Wave of the Future," Spirit Enterprises, 1987
6. Tizes, B.R. "The Secret Costs of HMO's," Spirit Enterprises, 1987
7. Tizes, B.R., "The New Dating Game," Spirit Enterprises, 1987
8. Tizes, B.R. "The Procreation Prerogative" Spirit Enterprises, 1987

9. Bosniak, S., Tizes, B.R. "Tri-Malar Fractures: Diagnosis and Treatment," Advances in Ophthalmic Plastic and Reconstructive Surgery, Pergamon Press, 1987
10. Tizes, B.R. "The Trojan Horse," MacGuide Magazine, March, 1988
11. Tizes, B.R. "Flexible Optical Character Recognition Software," MacGuide Magazine, March, 1988
12. Tizes, B.R. "MacLove: In Sickness and In Health," bioMEDICUS, April 1988
13. Tizes, B.R. "Ophthalmology: A Medicolegal Guide," Lane Medical Litigation Guide, 1988
14. Tizes, B.R. "Biological Interfaces," bioMEDICUS, June 1988
15. Tizes, B.R. "Turbodownload," Mac Symposium, December, 1988
16. Tizes, B.R. "A Is For Apple, /UX is for UNIX," MacGuide Magazine, Winter, 1988
17. Tizes, B.R. "Billions and Billions of Bytes," MacGuide Magazine, Spring, 1989
18. Tizes, B.R. "The Professional Information Network," Macintosh Business Journal, Spring, 1989
19. Tizes, B.R., Duty, D.G., Ferino, C.K., Bensky, P. "MacGuide USA: CD-ROM Edition," MacGuide Advanced Technology, 1:1, Winter-Spring, 1989
20. Tizes, B.R. "Goood Morning CD-ROM," APDAlog, Spring, 1989
21. Tizes, B.R., Ferino, C.K. "MacROMGuide," Maxwell Information Systems. 1:1 Spring, 1989
22. Tizes, B.R, Duty, D.G., VanAlstyne, D., "MacGuide USA: CD-ROM Edition," Keva Systems, 1:2, Summer, 1989

APPENDIX: LOCAL RULE 56.1(b) STATEMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
GEORGE KOURKOUNAKIS,

Plaintiff,

04 CIV 0586 (JSR)

-against-

JOSEPH DELLO RUSSO, M.D.,

Defendant.
----------X

PLAINTIFF'S LOCAL RULE 56.1(b) STATEMENT

Pursuant to Local Rule 56.1(b), Plaintiff George Kourkounakis submits the following opposing statement contending that there are genuine issues to be tried.

1. The plaintiff's date of birth is December 25, 1956. (Tomaszewski Dec., Ex. F, at 6).

Response: Plaintiff admits that his date of birth is as stated, but fails to see how his birth date is material to any item of contention in Plaintiff's Summary Judgment Motion.

2. Prior to February of 2002, the plaintiff complained of poor night vision and difficulty seeing distance clearly at night. (Tomaszewski Dec., Ex. F, at 17, 24).

Response: Admitted.

3. The plaintiff began considering having a LASIK procedure when he was on vacation in 2001 and someone mentioned it to him. (Tomaszewski Dec., Ex. F, at 33-34).

Response: Plaintiff fails to see the materiality of this statement to the Summary Judgment Motion. In the event, however, that this is material, Plaintiff admits the statement, and adds that no

particular doctor that performed LASIK was discussed. [Kourkounakis Deposition Transcript pp 35-36], and both before and after KOURKOUNAKIS went on vacation, he heard about LASIK surgery from Dello Russo's advertisements on 1010 WINS radio: "Well, Dr. Dello Russo advertised a lot on the radio, and that's how the thought came to my mind about it." *Id.* at 35.

4. The plaintiff's first appointment with Dr. Dello Russo was February 12, 2002.(Tomaszewski Dec., Ex. F, at 36-37).

Response: Admitted.

5. Plaintiff's expectation was to have a consultation at the February 12, 2003 appointment and to have the procedure done. (Tomaszewski Dec., Ex. F, at 42).

Response: Defense is putting forth a statement made in deposition to improperly suggest to the court that Kourkounakis' expectation was to have the procedure done the same day as the initial consultation. Plaintiff disagrees with this statement for several reasons. First the date is wrong. Plaintiff was expecting to have only a consultation on February 12, 2002, and not the surgery. Plaintiff was not expecting to have the procedure done on February 12, 2002, but rather at a later date. "Q. As of the time that you left Dr. Dello Russo's office on the date of your procedures, had you paid for the procedures? A. Yes, I did pay him. Q. You paid that day? A. Yes, I did. Q. Do you remember how much it was that you paid? A. He originally wanted $5,000, and I didn't have that much because I wasn't prepared to have that, the surgery specifically, and I got the money brought to me and I paid $4,000. Q. Was that in cash or a check or something else. A. It was in cash. That's what he accepted it for." [Kourkounakis Deposition Transcript pp 79-80].

6. When the plaintiff first arrived at Dr. Dello Russo's office on February 12, 2002, he completed some forms. (Tomaszewski Dec., Ex. F, at *45* & Ex. J).

Response: Admitted.

7. The plaintiff filled out and signed a New Jersey Eye Center information form indicating that his chief complaints were "poor vision", "poor night vision", "reading phone book", and "night driving problems". (Tomaszewski Dec., Ex. J).

Response: Admitted.

8. Thereafter, a lady took him through some tests and he was then seen by a young male doctor. (Tomaszewski Dec., Ex. F, at 50-52).

Response: Admitted that a lady "took him through some tests," but deny that he was seen by a young male doctor. First, Kourkounakis stated that "I don't know if he was a doctor. I assume he's a doctor." Second, the only people that Dello Russo swore to in response to Plaintiff's interrogatory number 3 ("'Identify' 'all' persons who explained the process and procedures of LASIK to the plaintiff GEORGE KOURKOUNAKIS." Response: The following is a list of those persons who explained the "process and procedures of LASIK" to plaintiff: a) Defendant Joseph Dello Russo, MD; b) William Kellogg, MD") Neither Joseph Dello Russo, MD nor William Kellogg MD is "young." Also, William T. Kellogg, masquerading as a licensed physician, was practicing medicine in New York State, by advising Kourkounakis of the benefits and risks of LASIK without a license after having his license revoked by the State of New Jersey Board of Medical Examiners. *See* attached revocation order, and associated material. *See also*, Plaintiff's Expert Report. *See also* Defendant's Exhibit K wherein "W Kellogg" signed the "voluntary consent as a witness" See also Eye Doctor's Insurer Ordered to Pay $15.3 Million in Malpractice Claims (attached) http://kyw.com/jersey/NJ--EyeSurgeon-Malpra-jn/resources_news_html (last visited on 01 MAR 04). Judge Lawrence Smith's decision acts as collateral estoppel against Dello Russo concerning his use of unlicensed personnel to

render services requiring a medical license.

9. This male spoke with him about his vision and the effects of the surgery. (Tomaszewski Dec., Ex. F, at 54).

Response: Plaintiff admits that a male (Dr. Kellogg), but not necessarily "a young male doctor," spoke with him about his vision and effects of the surgery. Plaintiff denies that Dr. Dello Russo spoke with him prior to his surgery. Certainly there is no indication in the patient's chart that anyone other than Dr. Kellogg, an unlicensed physician, spoke to Kourkounakis prior to surgery. *See* generally Medical chart for Kourkounakis.

10. Prior to undergoing the procedure, the plaintiff was told that the surgery would improve his vision and decrease his ability to read. (Tomaszewski Dec., Ex. F, at 54).

Response: Plaintiff admits that he was told at Dello Russo's office that the surgery would improve his vision. Plaintiff denies that he was only told that surgery would decrease his ability to read. Defense counsel purposefully omits the balance of that conversation as follows: "Q. Do you remember anything specific that he told you before you met Dr. Dello Russo? A. He mentioned to me that the surgery will improve my vision, and it will decrease the ability to read, but within hand distance I would be able to read. I said, you know, in that case, it's okay for me if I can read hand distance. Any point hand distance like that he says you will be able to read normally. With that in mind, I says, okay, let's go for it. Q. Was your concern at that time that it might change your ability to read up close? A. In the way he described it to me, it was within hand distance. I said, you know, within hand distance, I could live with that it if improves my night vision and my other vision. If I could read in hand distance, I'm happy. Q. Did he say that the surgery might affect your ability to read at hand distance? A. No, he said you will be able to read within hand distance. That's what he said to me. That's why I went for it. Because I wanted to improve seeing far, and hand distance I could live with it, yeah. Q. Up to that point, had you any problems reading hand

distance? A. No, I didn't. Q. Did this particular person discuss with you specifically what was involved in the LASIK procedure? A. No. If he did, I don't remember. Q. Did he discuss with you any possible complications that may occur from the LASIK A. No. " [Kourkounakis Deposition Transcript pp 54-56].

11. Prior to undergoing the LASIK procedure, the plaintiff was given consent forms that he signed. (Tomaszewski Dec., Ex. F, at 62).

Response: Admitted, but plaintiff disputes the validity of the consent allegedly obtained by these forms. *See* Plaintiff's Expert Report.

12. A true and correct copy of the informed consent form is attached as Exhibit K to the Tomaszewski Declaration.

Response: Admitted, except that Plaintiff denies that the consent was "informed consent", despite the title of the form. *See* Plaintiff's Expert Report.

13. The general subject matter of the informed consent form concerns the background of the procedure itself, treatment guidelines, alternative treatments, and risks and possible complications of the LASIK procedure. (Tomaszewski Dec., Ex. K).

Response: Plaintiff disputes the validity of the consent allegedly obtained by these forms. *See* Plaintiff's Expert Report. This consent was <u>not</u> informed. Plaintiff denies speaking with Dr. Dello Russo at any time prior to the surgery. Dr. Kellogg, an unlicensed physician, whom Dr. Dello Russo claims was working as a mere "technician" because his license was revoked for performing unnecessary laser surgery on patients: "He wanted a job, to work as a technician, not as a physician. Q. And did you give him [Kellogg] a job? A. I gave him a job as a technician," *See* Dello Russo Deposition p. 39. *See also* New Jersey State Board of Medical Examiners' Disciplinary Record of William T. Kellogg, MD.

14. The "treatment guidelines" portion of the informed consent form for LASIK identifies various alternatives that the plaintiff must have rejected. (Tomaszewski Dec., Ex. K).

Response: Plaintiff denies that the consent was "informed", and denies that plaintiff "must have rejected" the various alternatives to LASIK surgery. The non-licensed person who should have "informed" the plaintiff of the LASIK procedure in fact guaranteed a successful outcome contrary to New York State law. *See* Response # 10, *supra*. *See also*, Plaintiff's Expert Report.

15. Among the alternatives on the informed consent form that the plaintiff must have rejected are no surgery, glasses, contact lenses, and other refractive procedures. (Tomaszewskj Dec., Ex. K).

Response: Plaintiff denies that the consent was "informed", and denies that plaintiff "must have rejected" the various alternatives to LASIK surgery. The non-licensed person who should have "informed" the plaintiff of the LASIK procedure in fact guaranteed a successful outcome contrary to New York State law. *See* Response # 10, *supra*. *See also*, Plaintiff's Expert Report.

16. In the "treatment guidelines" portion of the informed consent form for LASIK, the plaintiff was also asked to acknowledge that he understands that "LASIK is NOT A RISK FREE procedure." (Tomaszewski Dec., Ex. K).

Response: Plaintiff denies that the consent was "informed", but admits that the quoted language is on the form. No one ever explained the risks of LASIK to plaintiff. "Q. Before your surgery, did you have a discussion with anyone at Dr. Dello Russo's office about potential risks or complications of the LASIK procedure? A. No. Like I said, the only thing that was mentioned with that male guy. He said to me that my reading would not be as good, but with hand distance, I will be able to read. That's the only thing that I recall." *See* Plaintiff's

deposition p. 59-60.

17. In paragraph 1 under the "patient consent" section of the form, it is documented that the "basic nature of the procedure as well as the possible risks and benefits" of LASIK are understood. (Tomaszewski Dec., Ex. K).

Response: Plaintiff denies this characterization of what the consent form says. Opposing counsel twists the wording of the actual consent and thereby improperly imputes an "informed" understanding on the part of the plaintiff to the LASIK procedure.

18. In paragraph 1 under the "patient consent" section of the form, the plaintiff was asked to acknowledge that he understood that "it is impossible for the doctor to inform [him] of every conceivable complication that may occur or guarantee good visual results." (Tomaszewski Dec., EX. K).

Response: Plaintiff denies that he "acknowledged" the quoted language. First, an acknowledgement has special legal significance, and the word "acknowledge" or "acknowledgement" does not appear anywhere in the consent. Second, plaintiff denies he was asked if he understood the quoted language. *See* response to # 16, *supra*.

19. In paragraph 2 under the "patient consent" section of the form, the plaintiff was asked to acknowledge that he "understand[s] that the correction obtained after surgery may not eliminate all of [his] myopia, hyperopia and/or astigmatism and that although infrequent, additional correction with glasses, contact lenses, or further surgery may be needed. (Tomaszewski Dec., Ex. K).

Response: Plaintiff denies that he "acknowledged" the quoted language. First, an acknowledgement has special legal significance, and the word "acknowledge" or "acknowledgement" does not appear anywhere in the consent. Second, plaintiff denies he was asked if he understood the quoted language. Third, plaintiff was told that surgery would improve his vision and that he would be able to read within

hand distance. Plaintiff was not told of the possibility of any complications, and in fact was guaranteed a good result. Plaintiff's condition is not correctible with glasses, contact lenses, or further surgery. *See* Plaintiff's Expert Report. *See* response to # 16, *supra*.

20. According to paragraph 4 under the "patient consent" section of the form, the plaintiff was asked to acknowledge the "small risk that [his] vision may be made worse." (Tomaszewski Dec., EX. K).

Response: Plaintiff denies that he "acknowledged" the quoted language. First, an acknowledgement has special legal significance, and the word "acknowledge" or "acknowledgement" does not appear anywhere in the consent. Plaintiff was told that surgery would improve his vision and that he would be able to read within hand distance. Plaintiff was not told of the possibility of any complications, and in fact was guaranteed a good result. Plaintiff's condition is not correctible with glasses, contact lenses, or further surgery. *See* Plaintiff's Expert Report. *See* response to # 16, *supra*.

21. Paragraph 9 of the informed consent form asked the plaintiff to acknowledge that he "will need reading glasses after about the age of 41." (Tomaszewski Dec., EX. K).

Response: Plaintiff denies that he "acknowledged" the quoted language. First, an acknowledgement has special legal significance, and the word "acknowledge" or "acknowledgement" does not appear anywhere in the consent. Plaintiff was not told that he would need to wear reading glasses after the procedure. "Q. Before having the LASIK surgery, do you remember discussing with anyone at the office whether you would still need to wear reading glasses after the procedure? A. No, I wasn't told anything like that." *See* Plaintiff's deposition p. 68. Plaintiff was told that surgery would improve his vision and that he would be able to read within hand distance. Plaintiff was not told of the possibility of any complications, and in fact was guaranteed a good result.

Plaintiff's condition is not correctible with glasses, contact lenses, or further surgery. "Q. Before your surgery, would you have been able to see the document on the table? A. Yes. Q. If you put the document closer to your eyes, can you see it? A. It's very blurry, not able to read it. Q. At the present time, if you need to read something, do you wear corrective lenses? A. Yes... Q. Do you have those reading glasses with you now? A. No. But five minutes after wearing them I get blurriness, and I can't carry on." [Plaintiff's Deposition p. 63-64]. *See also* Plaintiff's Expert Report.

22. The LASIK informed consent form was signed by the plaintiff. (Tomaszewski Dec., Ex. K).

Response: Admitted, but denies any consent was "informed." *See* Plaintiff's Expert Report.

23. The plaintiff read the eight page consent form for surgery before signing his initials at the bottom of each page. (Tomaszewski Dec., Ex. F, at 67).

Response: Admitted, except plaintiff was told that his vision would improve and that he would be able to read within hand's distance. *See* response to # 10, *supra*.

24. The plaintiff hand wrote on the consent form, "The doctor and his staff have fully explained the risks, benefits, and alternatives of the LASIK procedure. I understand that LASIK is an FDA approved procedure for the correction of farsightedness, nearsightedness and astigmatism. All of my questions have been answered to my satisfaction." (Tomaszewski Dec., Ex. F, at 66-67 & Tomaszewski Dec., EX. K).

Response: Admitted.

25. The plaintiff did not disagree with the eight page consent form when he read through it. (Tomaszewski Dec., EX. F, at 67-68).

Response: Denied. Plaintiff stated "I don't have any memory of disagreeing, no. In fact, I don't remember what it

mentioned. Two-and-a-half years ago I don't remember what." *See* Plaintiff's deposition p.67.

26. The plaintiff would not have signed the eight page consent form had he not agreed with it. (Tomaszewski Dec., Ex. F, at 67-68).

Response: Denied. Plaintiff stated that he had no specific recollection of reading through the document. *See* Plaintiff's Deposition p. 68.

27. The plaintiff initialed the bottom left hand corner of the page on which it is noted that following the procedure, and after age 41, he will need reading glasses. (Tomaszewski Dec., Ex. K).

Response: Denied. Plaintiff admits that he initialed the pages on the bottom right hand corner. Plaintiff was not told that he would need to wear reading glasses after the procedure. "Q. Before having the LASIK surgery, do you remember discussing with anyone at the office whether you would still need to wear reading glasses after the procedure? A. No, I wasn't told anything like that." *See* Plaintiff's deposition p. 68.

28. Plaintiff was 45 years of age as of February 12, 2002. (Tomaszewski Dec., Ex. J)

Response: Admitted.

29. Dr. Dello Russo performed LASIK on both of plaintiff's eyes on February 12, 2002. (Tomaszewski Dec. Ex. F, at 74-75).

Response: Plaintiff's deposition cited by opposing counsel does not support this statement. Furthermore, Dello Russo's signature does not appear on plaintiff's chart. Dello Russo testified that "-- I never -- I hardly ever write on a chart, hardly ever," and he has no means, such as a Dictaphone, for recording operative notes. Dello Russo Deposition p. 83.

30. It is plaintiff's contention that the reports of the experts are diametrically opposed, which in and of itself creates questions of material fact, and that summary judgment is

therefore improper. *See* Plaintiff's and Defendant's respective experts' reports.

31. Plaintiff notes that Defendant's Expert's report is not admissible because it does not conform to Rule 26 (a) in that it is lacking the compensation paid to the expert. Furthermore, defendant's expert's affidavit is well beyond the scope of his expert report, and should be stricken and not considered by the court in this Summary Judgment motion.

32. Plaintiff George Kourkounakis believed that the person explaining the risks of the LASIK procedure was a medical doctor licensed to practice medicine in New York. *See* Kourkounakis Declaration.

33. Plaintiff George Kourkounakis would not have undergone LASIK surgery if he had known that the person explaining the risks of the LASIK procedure was not a medical doctor licensed to practice medicine in New York, or was told by said person that there are real risks of losing one's vision and/or having a bad outcome, rather than said person guarantying a favorable result. *See* Kourkounakis Declaration.

Dated: March 1, 2005
Woodmere, New York

/S/

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APPENDIX: DISTRICT COURT MEMORANDUM ORDER

GEORGE KOURKOUNAKIS, Plaintiff, -v- JOSEPH DELLO RUSSO, M.D., Defendant.

04 Civ. 0586 (JSR)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK

2005 U.S. Dist. LEXIS 8020

May 3, 2005, Decided

May 4, 2005, Filed

SUBSEQUENT HISTORY: Affirmed by *Kourkounakis v. Dello Russo, 2006 U.S. App. LEXIS 3786 (2d Cir. N.Y., Feb. 14, 2006)*

DISPOSITION: [*1] Defendant's motion for summary judgment granted in all respects.

COUNSEL: For George Kourkounakis, Plaintiff: Victor M. Serby, Victor M. Serby, Woodmere, Ny.

For M.D. Joseph Dello Russo, Defendant: John Tomaszewski, Richard O. Mannarino, Marulli & Associates, P.C, New York, NY.

JUDGES: JED S. RAKOFF, U.S.D.J.

OPINIONBY: JED S. RAKOFF

OPINION:

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

In this medical malpractice diversity action, plaintiff George Kourkounakis alleges that defendant Joseph Dello Russo, M.D. obtained plaintiff's consent to the surgical procedure known as Laser-Assisted In Situ Keratomileusis ("LASIK") without adequately informing him of the risks and then performed the LASIK surgery in a negligent manner, leading to substantial loss of eyesight. Defendant has moved for summary judgment on both counts. Although the manner in which defendant conducts his highly commercial business may raise some eyebrows, plaintiff's utter failure to produce competent evidence supporting even the most elementary requirements of his claims obliges the Court to grant defendant's motion.

The pertinent facts, either undisputed or, where disputed, taken most favorably to plaintiff, are as follows. [*2] On February 12, 2002, Kourkounakis, after hearing one of Dr. Dello Russo's 1010 WINS radio advertisements for LASIK surgery, visited Dr. Dello Russo's offices for a consultation concerning the possibility of correcting his poor night vision. See Deposition of George Kourkounakis, August 25, 2004 ("Kourkounakis Dep."), at 35-37, attached as Exhibit F to Declaration of John Tomaszewski, February 17, 2005 ("Tomaszewski Decl."). During the consultation, plaintiff completed a New Patient Intake Form, on which he listed his chief complaints as "poor vision," "poor night vision," "[trouble] reading phone book," and "night driving problems."

New Patient Intake Form, February 12, 2002, at 1, attached as Exhibit J to Tomaszewski Decl.

After completing the forms, plaintiff was given some routine vision tests, and was then seen by William Kellogg, M.D., a consultant who, unbeknownst to plaintiff, had had his medical license revoked by the New Jersey State Board of Medical Examiners. See Kourkounakis Dep. at 50-52; Final Order of State of New Jersey Dep't of Law & Public Safety, Division of Consumer Affairs, Board of Medical Examiners, May 3, 1995, attached as an unnumbered exhibit accompanying [*3] plaintiff's summary judgment motion papers. It is undisputed, however, that, Dr. Kellogg talked to plaintiff about some of the potential complications of the surgery. Id. at 54. According to plaintiff, the following exchange occurred between himself and Dr. Kellogg:

> Q Do you remember anything specific that [Dr. Kellogg] told you before you met Dr. Dello Russo?
>
> A He mentioned to me that the surgery will improve my vision, and it will decrease the ability to read, but within hand distance I would be able to read. I said, you know, in that case, it's okay for me if I can read hand distance. . . .

Id.

Following the consultation, plaintiff reviewed and executed an Informed Consent Form, initialing the bottom of each page and signing the signature page. See Informed Consent Form for Laser Assisted In Situ Keratomileusis, February 12, 2002 ("Informed Consent Form"), attached as Exhibit K to Tomaszewski Decl. In numerous places, the form warned of the risks and potential complications involved in the LASIK procedure. Id.

Later that same day, Dr. Dello Russo performed the LASIK procedure on both of plaintiff's eyes. Dissatisfied with the results, plaintiff [*4] then brought this suit.

(1) Plaintiff's Claim of Lack of Informed Consent. Under *New York Public Health Law § 2805-d*, for a doctor to be found liable for failure to obtain a patient's informed consent to a medical procedure, a plaintiff must satisfy three requirements. First, he must show that the physician failed to apprise him of a reasonably foreseeable risk of the procedure. Second, he must show that a reasonable person in his condition, if told of the undisclosed risk, would have chosen not to undergo the procedure. Third, he must show that the procedure was the proximate cause of his injury. *Bernard v. Block, 176 A.D.2d 843, 848, 575 N.Y.S.2d 506 (2d Dept. 1991)*; see also *Shkolnik v. Hospital for Joint Diseases Orthopaedic Institute, et al., 211 A.D.2d 347, 350, 627 N.Y.S.2d 353 (1st Dept. 1995)*. Here, plaintiff has failed to make out a prima facie showing of any of these elements, let alone all three.

As to the first element, plaintiff has adduced no evidence that he was not apprised of the foreseeable risk that LASIK surgery might reduce his vision. For example, the Informed Consent Form stated:

> I understand that LASIK is NOT [*5] A RISK FREE procedure.
>
> * * *
>
> I understand that it is impossible for the doctor to inform me of every conceivable complication that may occur or guarantee good visual results.
>
> * * *
>
> I understand that I will need reading glasses after about the age of 41.

* * *

> I understand that as a result of surgery using the Excimer Laser there is a small risk that my vision may be made worse (0.027% at the end of 2000).

* * *

Informed Consent Form at 2-3.

As to the second element, even assuming arguendo that the consent form failed adequately to apprise a reasonable person in plaintiff's position that there was a risk that his vision might get worse, plaintiff has failed to show that such a person, if more fully informed, would then decide not to go through with this procedure. In particular, plaintiff has not contested that, as the Informed Consent Form asserts, the likelihood of such a result is sufficiently low that a reasonable person would still reasonably choose to go forward with the surgery, as, indeed, thousands have.

As to the third element, even assuming arguendo that plaintiff could satisfy the other two requirements, he has utterly [*6] failed to show that the LASIK surgery caused his deteriorating vision. Indeed, there is a more fundamental problem here that independently warrants summary judgment on defendant's behalf: plaintiff has entirely failed to adduce any evidence of any injury whatever, let alone an injury cause by the LASIK surgery. Thus, in his "56.1 Statement," plaintiff nowhere asserts exactly what his injuries were. At most, he vaguely hints that his ability to read without glasses decreased; but quite aside from the fact that this was a risk of which he was fully informed, see infra, his 56.1 Statement nowhere specifies how much deterioration there was from before the surgery to afterwards, let alone that it was material and not due to advancing age.

(2) Plaintiff's Negligence Claim. Plaintiff's negligence claim consists of (a) a re-hash of his claim of failure to provide

informed consent, already dealt with above, and (b) a claim that the surgery itself was negligently performed. The latter claim must fail, like the former, if for no other reason than the failure to specify an injury. Additionally, it must also fail because, under New York law, such a claim must be supported by competent [*7] evidence from a qualified expert. See, e.g., *Canter v. Mulnick, 93 A.D.2d 751, 752, 461 N.Y.S.2d 305 (1st Dep't 1983)*; *Amsler v. Verrilli, 119 A.D.2d 786, 787, 501 N.Y.S.2d 411 (1st Dep't 1986)*. Here, the only "expert report" submitted by plaintiff consists of a largely conclusory affidavit from one Bruce Randolph Tizes, M.D., J.D., a resident of St. Thomas, VI, who appears to have been occupied sine 2000 as a managing partner at Galt Capital, an investment advisory firm, and does not appear to have practiced medicine since the mid-1990s, does not appear to have a valid medical license, never specialized or trained in ophthalmology, never performed or was accredited in LASIK, and never examined the plaintiff. See "Expert" Report of Bruce Randolph Tizes, M.D., J.D., December 9, 2004, attached as Exhibit G to Tomaszewski Decl. Most tellingly of all, Dr. Tizes nowhere states what is wrong with the plaintiff or how his vision has been affected, let alone in what respect plaintiff's surgery was negligent. Accordingly, plaintiff has not met the most minimum requirements of a negligence claim.

Accordingly, for the foregoing reasons, defendant's motion for summary judgment is hereby granted [*8] in all respects. Clerk to enter judgment.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
May 3, 2005

APPENDIX: SECOND CIRCUIT SUMMARY ORDER

GEORGE KOURKOUNAKIS, Plaintiff-Appellant, -v.-
JOSEPH DELLO RUSSO, Defendant-Appellee.

05-2927-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2006 U.S. App. LEXIS 3786

February 14, 2006, Decided

NOTICE: [*1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from a Judgment of the United States District Court for the Southern District of New York (Rakoff, J.) entered May 3, 2005, granting defendant's motion for summary judgment. Also, appeal from an order of the district court conditioning a time extension on the payment of $ 1,000 to the clerk's office. *Kourkounakis v. Dello Russo, 2005 U.S. Dist. LEXIS 8020 (S.D.N.Y., May 3, 2005)*

COUNSEL: FOR APPELLANT: VICTOR M. SERBY (Catherine M. Conrad on the brief), Woodmere, NY for Plaintiff-Appellant.

FOR APPELLEE: JOHN TOMASZEWSKI, Marulli & Associates P.C., for Defendant-Appellee.

JUDGES: PRESENT: HON. DENNIS JACOBS, HON. PIERRE N. LEVAL, HON. CHESTER J. STRAUB, Circuit Judges. OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment and order of the district court be AFFIRMED.

In this diversity suit, George Kourkounakis ("Kourkounakis") asserts state claims arising out of injuries

allegedly suffered after undergoing LASIK surgery: (a) that Dr. Joseph Dello Russo ("Dello Russo") failed to elicit informed consent and (b) that [*2] Dello Russo deviated from accepted medical practice in the surgery. This Court reviews a grant of summary judgment de novo. *Santos v. Murdock, 243 F.3d 681, 683 (2d Cir. 2001)*. Kourkounakis also challenges an order of the district court conditioning a time extension for filing expert reports on the payment of a $ 1,000 sanction to the clerk's office. This court reviews the imposition of *Rule 37* sanctions for abuse of discretion. *Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1365 (2d Cir. 1991)*. We assume familiarity with the facts, the procedural history, and the issues on appeal.

1. New York law requires a medical malpractice plaintiff to establish (inter alia) "a deviation or departure from accepted practice." *Amsler v. Verrilli, 119 A.D.2d 786, 786, 501 N.Y.S.2d 411 (N.Y. App. Div. 2d Dep't 1986)*. Plaintiff attempted to adduce evidence as to this element by producing the supposedly expert opinion of one Bruce Randolph Tizes, M.D., J.D.. The district court rejected Tizes' qualifications to render an expert opinion on the LASIK procedure in view of the fact that he had not practiced medicine since the mid-1990s, did not appear to have [*3] a valid medical license, never trained in that methodology, never performed or was accredited in LASIK, and never examined the plaintiff. For summary judgment appeals where "contested evidence is essential . . . and the trial court has excluded the evidence, we may decide the appeal . . . on the basis of the soundness of the evidentiary ruling." *Raskin v. Wyatt Co., 125 F.3d 55, 67 (2d. Cir. 1997)*. We affirm, because the district court did not abuse its discretion in concluding that Dr. Tizes lacked the necessary qualifications to establish an issue of material fact as to the adequacy of the procedures Dello Russo followed. See *Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.

Plaintiff also failed to produce competent expert evidence for his claim of lack of informed consent. Under New York

law, a patient making this claim must "adduce expert medical testimony in support of the alleged qualitative insufficiency of the consent." *N.Y. Civ. Prac. L. & R. § 4401-a* (McKinney 2005). See also, *LaMarque v. North Shore Univ. Hosp., 227 A.D.2d 594, 594, 643 N.Y.S.2d 221 (N.Y. App. Div. 1996)* ("An [*4] expert witness must possess the requisite skill, training, knowledge, or experience to ensure that an opinion rendered is reliable."). Based on the same concerns with Dr. Tizes's qualifications discussed above, the district court did not abuse its discretion in finding the testimony of Dr. Tizes incompetent to sustain the plaintiff's claim of lack of informed consent.

2. Under *Rule 37(b)*, a district court may order any "just" sanction for failure to comply with a discovery order. *Fed. R. Civ. P. 37(b)(2)*. Under *Rule 37*, the district court has "broad" discretion to curb "abusive litigation practices." *Friends of Animals v. United States Surgical Corp., 131 F.3d 332, 334 (2d Cir. 1997)*. The district court's case management plan called for Kourkounakis's expert report to be filed by October 20, 2004; Korukounakis only sought an extension of time for the first time at a December 15 conference. The district court found that this delinquency was part of "a practice . . . of disregarding orders and deadlines set by the Court," and did not abuse its discretion in imposing a $ 1,000 sanction under *Rule 37*.

For the foregoing reasons, [*5] we AFFIRM the judgment and order of the district court.

APPENDIX: F.R.E. RULE 201

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule.

This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts.

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary.

A court may take judicial notice, whether requested or not.

(d) When mandatory.

A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard.

A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice.

Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury.

In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.